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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 BRIAN ALFORD,

11 Petitioner,

12 vs.

13 D.W. NEVEN, *et al.*,

14 Respondents.
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Case No. 2:14-cv-00333-APG-NJK

ORDER

17 This habeas corpus action comes before the court on respondents' motion to dismiss (Dkt. #16)
18 as well as petitioner's motion for leave to file a second amended petition (Dkt. #s 20 & 21).¹

19 In their motion to dismiss, respondents argue that, of the five grounds, two are either
20 noncognizable in federal habeas corpus or are unexhausted (Dkt.#16, pp. 4-5). Petitioner, through
21 counsel, filed a response to the motion to dismiss and a request to file a second amended petition
22 (Dkt.#21). Petitioner now acknowledges that it was ill-advised to bring ground 5(B)—related to the state
23 district court's alleged abuse of discretion in not addressing jury questions—as a substantive subpart to
24 ground 5. Petitioner, therefore, requests permission to file a second amended petition “which would
25 transmute the jury note incident from a substantive claim into a fact in support of the felony murder jury
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27 ¹ Petitioner filed one document styled a response to respondents' motion to dismiss and
28 request to file a second amended petition, which was docketed as two separate motions (Dkt. #s 20
& 21). The court shall cite to the document as Dkt. #21.

1 instruction [claim] found in ground 2(A) and the sufficiency of the evidence claim found in ground 4"
2 of the first amended petition (Dkt. #21, p. 3).

3 Respondents replied and state that they do not oppose petitioner filing a second amended
4 petition (Dkt. #27, p. 3). They note that they do not waive any defense to a newly-filed petition,
5 including exhaustion. *Id.* at 3-4. Good cause appearing, the court shall grant petitioner leave to file a
6 second amended petition, and therefore, the motion to dismiss shall be denied without prejudice.

7 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (Dkt. #16) is **DENIED**
8 **without prejudice.**

9 **IT IS FURTHER ORDERED** that petitioner's motion to file a second amended petition (Dkt.
10 #21) is **GRANTED.**

11 **IT IS FURTHER ORDERED** that petitioner, through counsel, shall have **thirty (30)** days from
12 the date of this order to file and serve his second amended petition.

13 **IT IS FURTHER ORDERED** that respondents shall have **thirty (30)** days following service
14 of the second amended petition within which to answer, or otherwise respond to, the second amended
15 petition. Any response filed shall comply with the provisions set forth in this court's order dated April
16 4, 2014 (Dkt. #7, pp. 2-3).

17 **IT IS FURTHER ORDERED** that petitioner shall have **thirty (30) days** following service of
18 the answer, motion to dismiss, or other response to file a reply or opposition, with any other requests
19 for relief by respondents by motion otherwise being subject to the normal briefing schedule under the
20 local rules.

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22 Dated this 6th day of May, 2015.

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25 UNITED STATES DISTRICT JUDGE
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